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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 108

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

THE STIFFEL COMPANY,
Respondent.

RESPONDENT'S BRIEF.

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FOREWORD.

The statements of the facts of this case as made by petitioner, and by the Government in its amicus brief, are apparently made in an effort to fit a pattern of argument rather than to present the actual case as it was developed by proofs in the District Court. Most pertinent facts as found and affirmed below are omitted or but half-stated by petitioner, and the Government's brief, to an even greater extent, entirely overlooks significant facts upon which the District Court acted and as to which its judgment was affirmed.

This is not a case wherein the District Court, although finding the patents in suit invalid "granted the relief

sought on the theory that the defendant had engaged in unfair competition,"—nor is it a case in which the defendant merely copied the disclosure of a patent, and then, although the patent was held invalid, was enjoined from copying the patent disclosure "perpetually", as both petitioner and the Government contend as the very basis for their arguments.

On the contrary, it was petitioner's conduct in watching respondent develop a successful market in a new product and then intentionally "moving in" with a precise copy of respondent's product, without petitioner marking or identifying its copies as to source of origin, resulting in actual confusion and likelihood of confusion, which was the basis for the finding below of unfair competition by petitioner. The petitioner was not "perpetually", or in any way, enjoined from making the subject matter of respondent's patents. It was enjoined from further acts of "unfair competition" in doing so. Petitioner has every right under the judgment below to make the products of respondent's patents, provided only that it do so "fairly", marking them in such manner as to avoid confusion as to source of the product.

Petitioner is "perpetually" enjoined only if it finds it necessary to market its copies of respondent's products, for all time, in an unfair manner.

A restatement of the facts to place them in their true perspective is essential.

STATEMENT OF THE CASE.

In January, 1956, at a trade show in Chicago, respondent, a manufacturer of high-quality lamps (R. 12), introduced to the trade a new and original product of its own design. This comprised a uniquely contoured demountable pole having compressive sections which maintain it in upright position, extending between a floor and a ceiling, and which has mounted thereon with fully concealed wiring, a plurality of electric lamps having specially designed and ornamented shades. The respondent's product so introduced in 1956 is illustrated at R. 76, and is embodied in the physical exhibit Pl. Ex. 3.

The showing by respondent at the trade show in January, 1956, introduced into the lamp industry for the first time the demountable and readily movable "pole lamp" now so widely known and widely sold.

As testified by wholly disinterested lamp marketing experts, respondent's original pole lamp, shown publicly in 1956, was something "new, different and revolutionary in the lamp business at that time", and it had a "great" impact on the market (R. 19). The new lamp "was very well received" by the public, and Marshall Field & Company in Chicago "made a special display * * * of this particular new item" (R. 20).

The buyer for Marshall Field & Company testified that respondent's pole lamp, when shown at the show in 1956, was to him "as a lamp buyer * * * something radically new in the lamp business" (R. 21).

The lamp buyer for John M. Smyth Furniture Company of Chicago was also a witness and testified that she first saw a pole lamp when she attended the 1956 show and

the "Stiffel pole lamp came to her attention" (R. 22). The reaction of the buyers at the show to the Stiffel pole lamp was described by her as having an immediate wide acceptance, and that "As a matter of fact, it seemed to create a mild sensation" (R. 22).

Both Marshall Field & Company and John M. Smyth Furniture Company are examples of respondent's customers who have a reputation for selling high-quality merchandise (R. 24). Asked as to the quality of respondent's product, one of the buyers testified "Well, of course we knew it was a better product. We knew that. We know Stiffel" (R. 24).

After the show in January, 1956, respondent designed a number of models of pole lamps in addition to that of Pl. Ex. 3 (R. 76) and these were illustrated in respondent's catalogs and brochures, Pl. Ex. 6, 7, 8 and 9 (Excerpted at R. 75-88) and were nationally advertised in such media as "House Beautiful", "Better Homes & Gardens", "House & Garden", "Living", "Sunset", "The New Yorker" (R. 81), and in "the Sunday newspaper supplements in twenty-five major cities" (R. 26). Such advertising started in the spring of 1956 (R. 26).

Public demand for respondent's pole lamps was "sensational" from the start and in the first four years sales totaled $3,256,850, at wholesale (R. 25).

All of respondent's pole lamp products were proudly marked with tags clearly showing them to be a "Stiffel" product (R. 16). The tags themselves are reproduced at R. 73 and 74.

Respondent applied for patents on its pole lamps and a mechanical patent No. 2,793,286 was issued on May 21, 1957. Design patent No. 180,251 (R. 71) was applied for on August 22, 1956, and issued May 7, 1957.

Petitioner, Sears, Roebuck and Co., is a large, indeed

the largest, retail marketing organization in the United States. It has a large national home furnishings department, and stores throughout the United States. The head of the department of petitioner which buys lamps is Frank C. Stover. Its lamp buyer is Robert M. Vallette.

Mr. Stover testified that petitioner had not sold pole lamps before the Stiffel lamp was introduced at the show in 1956 (R. 34). Both he and Mr. Vallette attended the shows, inspected the lamps in the Stiffel showroom (R. 37 and 41) and thereafter watched the "advent of pole lamps" (R. 37) and the development of respondent's market, examining the new product for mass-marketing possibilities (R. 37). When it became apparent that respondent's "revolutionary" pole lamp was becoming a very "hot item" (R. 37), petitioner, in the words of Mr. Stover, "moved into" that market (R. 38) created by respondent.

However, instead of "moving in" with its own product of its own design, petitioner, in August 1956[1] (R. 37) took a picture of respondent's pole lamp (R. 98-100) to Philadelphia where it induced one of its lamp suppliers, Randolph Metal Works, Inc., to make pole lamps for it which down to the smallest of details were copies of respondent's pole lamp Pl. Ex. 3. The copies so made are shown in the photographs of Pl. Ex. 10, appearing at R. 89 and 90.

The detailed identity of petitioner's copy (Pl. Ex. 10) of respondent's product Pl. Ex. 3, is so not only with respect to functional matters, but in the appearance and non-functional distinguishing characteristics, design and dress as well.

As sold by it, petitioner's copies of respondent's pole lamp were neither marked with any label nor did they bear or indicate the name of the manufacturer or their source

1. Before respondent had any patent, or had even applied for its design patent.

of origin (R. 28). There was an assembly instruction sheet with the pole lamp Pl. Ex. 10, sold by petitioner, and it appears at R. 93. Even here there is no identification of petitioner or of its supplier.

As a result of the display and sale of Pl. Ex. 10 pole lamps by petitioner, actual confusion as to origin did occur.

Both Marshall Field & Company and John M. Smyth Furniture Company employees testified as to instances of customer confusion.

Asked whether Marshall Field & Company had complaints from customers as to whether the lamps sold by Marshall Field & Company and those sold by petitioner, Sears, were the same product, Mr. Pemberton testified (R. 20):

> "We did have customers inquire of us, if lamps that looked to be similar to the Stiffel Lampole were the same and what was the reason for the price difference in some instances."

He then related a particular instance and referred to a letter of complaint asking "why was this same pole half the price from somebody else." It was petitioner's lamp to which the customer referred (R. 21).

Miss Passmore of John M. Smyth Furniture Company testified to similar occurrences at her store. She specifically referred to an instance where a customer complained that she had seen a pole lamp at a Sears, petitioner's, store "that was exactly like what she had purchased from us at a higher price" (R. 23).

Petitioner had made for it and sold a number of pole lamps of various designs besides that of Pl. Ex. 10. While a number of them closely simulated the pole lamps shown in respondent's patents and responded fully to the claims of its mechanical patent, there was no evidence that any

of petitioner's pole lamps except Pl. Ex. 10 was actually copied from one of respondent's products.

By a bill of particulars requested by petitioner, the respondent specified that it charged a number of petitioner's pole lamp products to infringe the mechanical patent in suit, and certain models only to infringe the design patent in suit. These were specified by model numbers and catalog pages but this material does not appear in the transcript of record.

However, it does appear in Pl. Ex. 26 (R. 104) that Sears had a variety of models and it does appear in the District Court Findings (R. 57) that petitioner's lamps exemplified by Pl. Ex. 10, 29, 30, 31, 32, 33, 34 and 35 and by Def. Ex. 6 and 8 were charged to infringe the patents in suit, but that only the lamps represented by Pl. Ex. 10 were charged to be made and sold in unfair competition with the respondent.

The District Court held that "were plaintiff's patent claims valid as invention over the prior art" each and every one of the petitioner's lamp models charged to infringe "would have infringed both of the patents in suit" (R. 64). However, the District Court held both patents in suit to be invalid as lacking in invention over the prior art.

The District Court did find, however, that petitioner was guilty of unfair competition in the manner in which it knowingly and intentionally copied its lamp Pl. Ex. 10 from respondent's lamp Pl. Ex. 3, and in the manner in which petitioner sold that particular product (R. 65). The District Court also found:

> "42. The pole lamp of defendant, plaintiff's Exhibit 10, is so closely similar to Plaintiff's Exhibit 3, plaintiff's product, as to be scarcely indistinguishable therefrom both in appearance and in functional details.

> The similarity is so close that confusion between them is likely, and some confusion has already occurred." (R. 65).

The District Court concluded that "Plaintiff is entitled to an injunction to restrain further unfair competition by defendant with respect to pole lamps identical to or confusingly similar to Plaintiff's Exhibits 3 and 10" (R. 67).

In its Judgment entered January 22, 1962 (R. 68) the District Court, after adjudging the patents in suit to be invalid and dismissing the charge of patent infringement, further ordered that:

> "Defendant and its agents, representatives and employees, are hereby enjoined from unfairly competing with plaintiff by selling or attempting to sell pole lamps identical to or confusingly similar to plaintiff's exhibits 3 and 10."

Actually, petitioner itself recognized the inequity and unfairness of its acts for in October, 1957, immediately after the complaint was filed herein, although continuing to order and sell other models, it ordered a discontinuance and a change in the pole lamps Pl. Ex. 10, which was known as Sears Model 7060. See Pl. Ex. 24 (R. 102), Pl. Ex. 25 (R. 103) and Pl. Ex. 28a and 28b (R. 108, 109).

These exhibits and the others previously mentioned and all of the witnesses on both sides previously named herein were presented to and were before the District Court personally. The testimony was not by deposition but was in open court. The trial court had the opportunity to and did observe, and often questioned, the witnesses before him. The court was fully and completely informed with respect to the issue of unfair competition as the result of the exhibits and testimony of witnesses presented in open court.

On appeal, the Court of Appeals for the Seventh Circuit

affirmed the District Court on all issues, both as to the patent infringement charges and as to the unfair competition charges.

As to the latter, the Court of Appeals said (R. 113):

> "There is substantial basis in the evidence to support the findings underlying the conclusion that Sears was guilty of unfair competition. The evidence is: The lamps had a decided impact on the market in 1956 as something revolutionary in lighting fixtures. In four years (1956-1960) Stiffel shipped about $3,250,000. in pole lamps. They were widely advertised in national magazines. Sears "moved in" when they saw the Stiffel pole lamp was moving toward a mass market. Sears lamps are not labelled, and the Sears lamp retails at the wholesale price of the Stiffel lamp.
>
> The Stiffel pole lamps and that of Sears made from a copy of a picture of the Stiffel lamp are before us as exhibits. A comparison of the two gives substantial support for the finding that the lamps have a remarkable sameness of appearance. And there is testimony of buyers for Marshall Field and Company and John M. Smyth Company of customer confusion. The finding that there is a likelihood of confusion and some actual confusion, as to the source of the lamps, is not clearly erroneous. The conclusion of unfair competition, based on the finding, is not erroneous [footnotes omitted]."

The Findings and Conclusions of the District Court and the opinion of the Court of Appeals as to the issue of unfair competition are in full harmony. Both courts examined the facts,—both agreed as to them.

ARGUMENT.

RESPONDENT HAS NO OCCASION TO QUARREL WITH THE CONTENTION THAT PATENTS ARE MATTERS OF FEDERAL AUTHORITY ONLY.

There is no occasion for respondent to quarrel with or to discuss the historically interesting (although somewhat inaccurate) review of publications, commencing with The Federalist Papers and the Records of the Federal Convention of 1787, and the many citations to cases and articles referred to by petitioner and the Government on the point that the federal government has the exclusive right to grant patents. While there may be some valid argument as to how and when the right to grant patents became federal, exclusive of the states, respondent certainly does not dispute the basic point.

But there is nothing in this case which is remotely pertinent to the Constitutional contentions made by petitioner, and even less, if that is possible, pertinent to such contentions raised in the Government's brief amicus.

THE GOVERNMENT'S ARGUMENT IS BASED UPON SUCH ERRONEOUS CONCEPTS OF THE FACTS IN THIS CASE AS TO MAKE ITS ENTIRE ARGUMENT POINTLESS.

The Government's brief takes as its primary premise the bland statement summarized at brief page 39, that in this case copying "was prohibited on the basis of findings (1) that the lamps are similar, and (2) that Stiffel's was developed before Sears'." To say that such is an understatement of the facts would be incorrect,—it is a patently erroneous statement of the facts.

The Government's brief takes as a secondary premise

its statement, summarized at brief page 11, that in this case:

> "A copier of these useful articles was held to have committed unfair competition because of the likelihood of confusion between the copy and the original—confusion resulting solely from the sale of the same product and without simulation of non-functional features identifying the source of the product. The question is whether in such circumstances it is consistent with the patent laws for a State's law of unfair competition to give the owner of the unpatented functional device the right to prevent others from copying it."

Both the statement of facts and the purported question are contrary to the present case.

Sears did not copy merely functional features and the District Court did not enjoin, nor did the Court of Appeals approve enjoining, the copying of functional features of the Stiffel products or its patents. On the contrary, the courts below held that Sears had and has the right to copy the functional features claimed in Patent No. 2,793,286 and moreover held that Sears had and has the right to copy even the Design Patent No. 180,251. The court held that Sears lamps exemplified in Pl. Ex. 29, 30, 31, 32, 33, 34 and 35, and in Def. Ex. 6 and 8 would infringe both patents if valid but did not enjoin their manufacture and sale. It was only continued unfair competition as to Pl. Ex. 10 which was enjoined.

As we have shown, Pl. Ex. 10 was admittedly a direct copy of all features of a Stiffel product, not its patent, which was widely shown and advertised and widely known as respondent's product long before a patent application was even filed. As to that very product, Pl. Ex. 10, confusion as to source was not only shown to be likely but actually existent. As to that finding, both courts below agreed.

The Government's brief (Page 13) recognizes that "the proper scope of State law in this area is to * * * protect the maker of a product against injury * * * from failure [of a competitor] to use readily available labels or packaging to identify the source of goods * * *." Yet while making that statement, it sets it aside as inapplicable here.

It would seem that the brief amicus for the Government is almost wholly unaware that in this case, at least as to the pole lamps Pl. Ex. 10, there was no label and no mark identifying them as either a Sears' product or that of its manufacturer.

Since the very basis for the Government's argument in this case is an erroneous understanding of the facts, it is wholly irrelevant here.

PETITIONER IGNORES THE PERTINENT FACTS.

Petitioner, whose counsel were present throughout the trial of this case and on appeal, does not have any excuse for neglecting the pertinent facts—except that they contradict petitioner's contentions.

First, petitioner says that the question here is whether a court, applying the law of unfair competition, may perpetually enjoin the sale of copies of a patented device after the patent covering the device has been judicially terminated.

Such cannot be the question here. The court did not perpetually, or for any time, enjoin sale of copies of the patented device. It enjoined only *unfair* sale of *one* model of petitioner's lamps copied from *one* model of respondent's products. The patents in suit were not "judicially terminated". They are of course now unenforceable against Sears. Actually, petitioner was specifically freed to make and sell numerous lamp models which the court held would infringe if either of the patents in suit was valid. Any number of additional models are open to peti-

tioner, if it has any originality at all, even though they might otherwise infringe if the patents were valid. The stated "question presented" is not truly the issue.

The petitioner says that Sears was held to be guilty of unfair competition only because of "similarity in appearance between the commercial pole lamps of Sears and Stiffel". That is so much an understatement of the facts as we have stated above as to make the contention absolutely incorrect.

Petitioner states in its argument that there is not in this case any subject matter outside the scope of the Stiffel design patent which was held invalid for lack of invention by the courts below. Again that is a gross understatement of the facts since the courts below held that there are a wide variety of Sears' pole lamps which would infringe the design patent in suit if it were valid and yet but one model of petitioner's lamps was held to have been made and sold unfairly.

The same contention is repeated by petitioner in its brief wherein it says that the identical ornamental appearance of the pole lamp, the unfair sale of which was enjoined, is the "sole subject matter" of respondent's design patent. Actually, the District Court found that at least nine other models of petitioner's pole lamps were within the subject matter of respondent's design patent at the time of trial, but did not enjoin their continued manufacture and sale.

Repeatedly in petitioner's brief, it is contended that the Court of Appeals has perpetually enjoined Sears from selling the pole lamp shown in the Stiffel design patent anywhere throughout the United States. Actually of course, the Court of Appeals enjoined no act. It affirmed the act of the District Court which enjoined only the *unfair* sale of the single model of petitioner's pole lamp, Pl. Ex.

10. Certainly petitioner cannot be so unimaginative and so unfair in its basic concepts of business competition as to be unable to devise a method of *fairly* competing with respondent.

ENJOINING UNFAIR COMPETITION DOES NOT GRANT A MONOPOLY.

Petitioner contends that the trial court's grant of an injunction to restrain "further unfair competition" in effect grants to respondent a perpetual monopoly. Petitioner concedes, and so does the Government's brief, that it is entirely proper for a court to enjoin the copying of a product where its appearance has acquired a "secondary meaning". It contends, however, that there was no finding of "secondary meaning" in this case and hence that the injunction improperly grants a perpetual monopoly in contravention of the constitutional rights to grant monopolies only by patent.

Assuming *arguendo* that the record does not show "secondary meaning" attaching to respondent's product, what difference could that make in any event so far as petitioner's basic contention is concerned?

If enjoining the copying of a product with exactitude and without clear indication of source amounts to the grant of a patent of perpetual duration and is therefore improper because of federal reservation of the right to grant patents, the same would be true even if "secondary meaning" were proved to the fullest extent. It could likewise be argued on the same basic contention that the Federal Trade Commission may not enter a "cease and desist" order as to similar matters because the authority to grant patents is delegated by law to the Commissioner of Patents and not to the Federal Trade Commission.

It could with the same force be argued that trademark

rights residing in the shape or configuration of an article could not be enforced by a federal court or a state court as similarly amounting to the grant of a monopoly in the nature of a patent by an unauthorized authority.

It seems obvious that the basic contention that enjoining unfair competition is a grant of a monopoly in violation of the reservation of rights relative to the issuance of patents is completely unsound. The test should be only whether there was in fact unfair competition and not whether the effect of the injunction in such a case is an invasion of the authority to grant patents. The fact is that the trial court and the Court of Appeals concurrently found that there was unfair competition in this case, that there was both actual confusion as to source and likelihood of confusion brought about by the defendant's acts. Certainly in dealing with such matters, the court should have the right to enjoin such unfair practices and in doing so to apply the local law of the forum, *Pecheur Lozenge Co.* v. *National Candy Co.*, 315 U. S. 666, 667; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The courts below having concurrently found the elements of unfair competition, it is not the proper function of a writ of certiorari to review questions of fact or of the sufficiency of evidence to support the findings. This Court has repeatedly stated that it will not issue a writ for such purpose, *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508.

In the case of *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178, in language especially apt here, this Court stated:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review

> the evidence or inferences drawn from it. * * * Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. * * * There is evidence to support them."

This Court emphasized the point that concurrent findings are to be disturbed only with the greatest reluctance in the case of *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 saying:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. * * *"

Enjoining the unfair competition found was clearly a matter within the authority of the trial court and its findings clearly supported that relief, as the Court of Appeals held. It should not therefore be a matter for dispute before this Court as to the details of the evidence or the inferences drawn from it by the courts below.

THE INJUNCTION AGAINST UNFAIR COMPETITION WAS FULLY AUTHORIZED UNDER THE DECISIONS OF THIS COURT.

There is no question but that the public generally has the right to utilize fully the teachings and disclosure of a patent once the monopoly granted has expired. It would not seem that the rights of the public should be any greater if a patent has been issued and held invalid than if a patent has issued and has run its full term. Such rights of the public to use freely the subject matter of an expired patent are not without limitations.

In *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169 and in *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, this

Court did define and state the rights of the public in the free use of the subject matter of an expired patent.

In the *Singer* case, it was expressly held by this Court that although the defendant had the right to make sewing machines of the expired patents and to refer to them by the word "Singer" which had become generic, such was

> "subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it *as will unmistakably inform the public of that fact.*" [163 U. S. 200, Emphasis ours.]

So also in the *Kellogg* case, this Court held that because of patent expiration and generic description, the defendant had the right to make "shredded wheat biscuits", to call them "shredded wheat" and to make them in the pillow form as made by plaintiff in its patented machines and patented designs which at that time had expired. Nevertheless, the Court said:

> "The question remains whether Kellogg Company in exercising its right to use the name 'Shredded Wheat' and the pillow-shaped biscuit, is doing so fairly. Fairness requires that it be done in the manner which reasonably distinguishes its product from that of plaintiff." [305 U. S. 120.]

In this case, petitioner committed its acts of unfair competition not after patent monopolies had been enjoyed by respondent and had expired, but before any patent rights existed. Petitioner was not therefore exercising the right of the public to utilize the teachings of an expired patent or even to utilize the teachings of a patent which petitioner had any ground to believe was invalid. Under such circumstances, can it be said that petitioner's rights are greater than the general public right to use the patent

after its expiration as stated in the *Singer* and *Kellogg* cases? Logically, it would seem not.

The fact is that petitioner did not in any way label or mark its copy of one of respondent's commercial products. It did not so mark the enjoined product as one made or sold by petitioner or its manufacturer in such way as would "unmistakably inform the public of that fact" which this Court has stated to be essential to fair use of an expired patent.

THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH DECISIONS IN THE SECOND CIRCUIT.

Petitioner further contends that the decision in this case is in conflict with decisions of other courts, citing particularly the Second Circuit cases of *G. Ricordi & Co.* v. *Haendler*, 194 F. 2d 914 and *Hygienic Specialties Co.* v. *H. G. Salzman, Inc.*, 302 F. 2d 614.

Petitioner quotes brief excerpts from the opinion by Judge Learned Hand in the *Ricordi* case. It did not, however, quote the very part of that opinion which shows lack of conflict between the present case and the rule in the Second Circuit. In the *Ricordi* case, Judge Hand's opinion says:

> "We do not mean that the defendant could under no circumstances be guilty of 'unfair competition' in his use of the 'work'; but it would have to be by some conduct other than copying it. Since he confined himself to that and gave notice that it was his product the Copyright Act protected him [194 F. 2d 914, 916]."

Since the defendant in the *Ricordi* case copied the subject matter of an expired copyright but did so fairly by giving "notice that it was his product", the decision is clearly in line with the rulings of this Court in both the *Singer* and *Kellogg* cases.

So too in the *Hygienic Specialties* case, 302 F. 2d 614, the Court of Appeals for the Second Circuit did not arrive at a decision which is at all in conflict with the lower courts' decision in this case. There, the design patent in suit was held invalid and it was further held that defendant had not been guilty of unfair competition in copying the plaintiff's product. However, it should in all fairness be pointed out that in that case there was one model only of the patented product, one model only of the copy, and the design patent in suit was held invalid as relating to nothing but the strictly functional characteristics of the soap dish there involved. As the court said at page 621:

> "As we have already pointed out, Hygienic's design was admittedly controlled by utilitarian requirements. *A fortiori,* Hutzler's dish, regardless of Hutzler's intentions, was subject to the same limitations. To paraphrase Gertrude Stein's commentary on a rose, a dish is a dish is a dish. Moreover the soap dishes were not identical. In addition to differences in the legs and side decoration, the Hygienic and Hutzler names were displayed prominently on the bottom of their respective soap dishes."

Obviously, the *Hygienic Specialties* case is not at all in conflict with the present case and, indeed, the Court of Appeals for the Second Circuit stated in the *Hygienic Specialties* case the same regard for principles of fair dealing as have been considered by the Court of Appeals for the Seventh Circuit. In the *Hygienic Specialties* case at page 619, the Court of Appeals said:

> "On the other hand, competition must be 'fair' both to the consumer and so far as possible, to the trade."

In both the *Ricordi* case and the *Hygienic Specialties* case, the Court of Appeals for the Second Circuit held acts of copying to be not unfair but, in each case, a very important consideration considered by that court was that

the accused unfair competitor had very clearly marked the product as his product rather than one emanating from the plaintiff. Both cases are clearly in line therefore with the *Singer* and *Kellogg* cases in this Court, and the decision in this case, in which Sears did not mark its product, is not in conflict with those decisions.

CONCLUSION.

The Court of Appeals for the Seventh Circuit has expressed in several of its decisions in unfair competition cases that in all such cases "it is principles of old-fashioned honesty which are controlling." The decisions of the Second Circuit and of every circuit in the country seem likewise to be decided upon the application of that principle and in that respect they are all in complete accord with the decisions of this Court in such cases as the *Singer* and the *Kellogg* cases.

To relieve petitioner from liability for its unconscionable copying of respondent's product while failing to mark petitioner's product with either its name or that of its manufacturer in such way as would "unmistakably inform the public of that fact" is clearly unfair and contrary to the principles of old-fashioned honesty which it is submitted should be controlling.

The writ of certiorari should be dismissed.

Respectfully submitted,

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